IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MARK A. NOVKOVIC and BETH R. NOVKOVIC, his wife,	)	
Plaintiffs,	)	
v.	)	C.A. No. 07C-10-248-WCC
MATTHEW PAXSON and GILES & RANSOME, INC.,	)	
Defendants.	)	

ON DEFENDANTS' MOTION FOR NEW TRIAL
OR REMITTITUR
DENIED
ON PLAINTIFFS' MOTION FOR COSTS AND INTEREST
GRANTED IN PART and DENIED IN PART

Submitted: February 23, 2009
Decided: March 16, 2009

Bartholomew J. Dalton, Esquire, DALTON & ASSOCIATES, P.A., Wilmington, Delaware, Attorney for Plaintiffs.

Seth A. Niederman, Esquire, FOX ROTHSCHILD, LLP, Wilmington, Delaware, Attorney for Defendants.

Michael P. Pullano, Esquire, WEBER, GALLAGHER, SIMPSON, STAPLETON, FIRES & NEWBY, LLP, Philadelphia, Pennsylvania, Attorney for Defendants.

ABLEMAN, JUDGE

Plaintiffs brought this action for damages arising from personal injuries sustained as a result of an automobile accident in which Plaintiffs' vehicle was rear-ended by a vehicle owned by defendant Giles & Ransome, Inc. The vehicle was being driven by defendant Matthew Paxson, who was operating it during the course of his employment with Giles & Ransome, Inc.

By the time of trial, Defendants had conceded liability for the accident and the resulting injuries to the Novkovics, but the parties were unable to agree upon an amount of damages that would fairly compensate Plaintiffs for pain, suffering, permanency, past and future medical expenses, and loss of consortium.

On February 11, 2009, at the conclusion of a two-day trial, the jury returned verdicts of $1.3 million in damages for plaintiff Mark A. Novkovic and $220,000.00 as damages for loss of consortium for plaintiff Beth Novkovic.[1]

Defendants have filed a Motion for New Trial or Remittitur. They assert that the jury award is "clearly excessive," that there was no evidence regarding any future medical expenses, surgery, treatment, or disability, that the jury deliberations were not long enough, and that the Court erred in not allowing evidence that Mr. Novkovic received compensation during periods of disability. Plaintiffs have moved for costs and interest.

[1] The Court will use "Plaintiff" to refer to Mr. Novkovic.

Defendants' Motion for New Trial or Remittitur

Standard of Review

Under Delaware law, a jury's verdict is presumed to be correct and just,[2] and is afforded great deference by the Court.[3] An award that is challenged as excessive will not be disturbed "unless it is so clearly so as to indicate that it was a result of passion, prejudice, partiality, or corruption."[4] When any "margin for reasonable difference of opinion exists in the matter of a verdict," the Court will yield to the jury's decision.[5] With respect to remittitur, the Court will not reduce a jury award unless it is "so grossly excessive as to shock the Court's conscience and sense of justice; and unless the injustice of allowing the verdict to stand is clear."[6]

Analysis

The evidence in this case established that Mr. Novkovic suffered extensive injury to his spinal column as a result of the collision, which required him to endure two spinal cord surgeries, anterior and posterior. The orthopedic surgeon who performed the operations testified that

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[2] *Storey v. Castner*, 314 A.2d 187, 193 (Del. 1973).

[3] *Young v. Frase*, 702 A.2d 1234, 1236 (Del. 1997); DEL. CONST. art. IV, § 11(1)(a).

[4] *Med. Ctr. of Del., Inc. v. Lougheed*, 661 A.2d 1055, 1061 (Del. 1995).

[5] *Storey*, 314 A.2d at 193 (citing *Burns v. Del. Coca-Cola Bottling Co.*, 224 A.2d 255, 258 (Del. Super. 1966)).

[6] *Riegel v. Dastard*, 272 A.2d 715, 717-718 (Del. 1970) (citing *Bennett v. Barber*, 79 A.2d 363 (Del. 1951)).

Plaintiff will have permanent injury and disability, which should be expected to cause him pain throughout his life. Significantly, Defendants' expert echoed this prognosis by agreeing that Mr. Novkovic would continue to suffer both pain and numbness.

In short, the Court is not only *not* shocked by the jury's decision in this case, but it considers the verdicts fair and reasonable. Mr. Novkovic was injured and he was injured badly. The MRI of his neck looks like the inside of the nuts and bolts section of a hardware store. The Court, having listened to the evidence, has no doubt that these injuries are painful and permanent, and that they have altered his life for the worse.

In addition to the pain and suffering that he has endured and will endure, Plaintiff's future earning capacity is far from certain. He is employed in the brokerage department of the Wilmington Trust Company, and he has had several lengthy periods of absence while recuperating from surgery, including during the time this trial took place. Mr. Novkovic is concerned, and for good reason: he has not been able to perform his duties or even be present at his workplace at a time when job losses in the financial services industry are rampant.

Other factors highlight the appropriateness of the jury's award in this case. Plaintiff's daughter was just an infant when this accident occurred, and the limitations and restrictions caused by the injury and the surgeries have precluded him from enjoying lifting, holding, and playing with his toddler, pleasures he can never recapture. Nor has he

been able to enjoy his greatest outdoor passion, fishing. From the Court's perspective -- and the jury's too -- Mr. Novkovic did not attempt to overreach or exaggerate his injuries or the extent of his limitations. He came across at trial as a decent, honest, hard-working husband and father who has legitimate and very real concerns for his future health and employability. Prior to the accident, he was healthy, active, and earning a decent and steady income. The jury found this evidence to be credible and persuasive, and the Court finds that the verdict in this case is not only not "clearly excessive," as claimed by Defendants, but that a reasonable jury could easily have found in excess of the verdict rendered without shocking the Court's conscience.

Defendants' practice of attempting to draw comparisons between this case and other cases he has cited is unavailing, of no value to the Court, and has even been described as "dangerous" by another Superior Court Judge:

> This Court has previously noted that 'it is difficult, if not dangerous, to refer to other cases to argue that a particular verdict is too high or too low.' It is inevitable that there will be dissimilar results in personal injury suits because no two juries will judge the effect of a plaintiff's injuries identically.[7]

Moreover, the fact that injuries may have been similar does not address the individual characteristics of different plaintiffs (such as age), the nature of their disability (if any), the nature of the expert opinions, or any

[7] *Bounds v. Delmarva Power & Light Co.*, 2004 WL 343982, at *8 (Del. Super. Jan. 29, 2004) (quoting *Berl v. Cyrus Trading Corp.*, 1998 WL 109855 (Del. Super. Feb. 19, 1998)).

of the whole host of factual differences that are necessarily unique to every personal injury case. While Defendants attempt to reargue their view of the evidence to the Court and to draw comparisons with other distinctly different verdicts, at this stage in the proceedings, the Court must view the evidence in the light most favorable to the plaintiffs.[8]

Defendants' next contention, that the jury's deliberations were inadequate because they only lasted an hour and fifteen minutes, does not convince the Court that the award was unfair. This was a short trial and the only issues for decision in the case were the nature and extent of Mr. Novkovic's injuries and Ms. Novkovic's loss of consortium, and the amount to be assigned to those damages. Liability and causation were not contested. It is difficult to imagine a more straightforward task for twelve jurors, especially when they were aided by a calculator, which the Court provided upon their request. Indeed, the brevity of the deliberations could just as easily have signaled a consensus among jurors about the value to be attributed to the plaintiffs' damages as to a failure to deliberate fully and conscientiously.

Defendants' reliance upon *Chilson v. Allstate Insurance Co.*[9] as support for its argument that a new trial should be granted because the jury's deliberation was abbreviated is hardly persuasive. In *Chilson*, the

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[8] *See, e.g.*, *Folk v. Hobbs*, 2001 WL 1739448, at *1 (Del. Super. Dec. 20, 2001); *Thomas v. Frank Morris Co.*, 1990 WL 91114, at *4 (Del. Super. June 13, 1990).

[9] 2007 WL 4576006 (Del. Super. Dec. 7, 2007).

Court had already concluded that the verdict was excessive and against the great weight of the evidence, and merely commented upon the brevity of the deliberations as adding to its uneasiness about the fairness of the award. Moreover, the Court in *Chilson* was also quick to point out that "brief jury deliberation is not, in itself, sufficient basis to support a new trial motion."[10] In a case where the evidence is plainly sufficient to support the verdict, as it is here, the length of time the jury deliberates is immaterial.

Finally, Defendants cite as error the Court's ruling that disallowed evidence that Mr. Novkovic was compensated to the full extent of his salary through a disability policy provided by his employer. This argument is contrary to long-settled Delaware law, and its assertion by counsel warrants further discussion by the Court.

The Delaware Supreme Court has repeatedly warned that counsel's failure to provide citations to support its argument will result in the Court deeming such legal arguments to have been waived. In a recent decision, the Court explained the policy:

> The appealing party is generally afforded the opportunity to select and frame the issues it wants to have considered on appeal. A corollary to that opportunity is a requirement that the appealing party's opening brief *fully* state the grounds for appeal, as well as the arguments *and supporting authorities* on each issue or claim of reversible error. Therefore, this Court has held that the failure of a party appellant to

[10] *Id.* at *4-5 (citing *Kearns v. Keystone Shipping Co.,* 863 F.2d 177 (1st Cir. 1998)).

> present and argue a legal issue in the text of an opening brief constitutes a waiver of that claim on review.[11]

The rationale for this ruling was further explained in that case as follows:

> In order to develop a legal argument effectively, the Opening Brief must marshall the relevant facts and establish reversible error by demonstrating why the action at trial was contrary to either controlling precedent or persuasive decisional authority from other jurisdictions. The failure to cite *any* authority in support of a legal argument constitutes a waiver of the issue on appeal.[12]

In a recent decision in this Court, Judge Parkins similarly admonished counsel for failing to cite a single authority from this or any other jurisdiction to support their client's positions and reminded them that "[c]ourts throughout the country hold that they are not obligated to do counsel's work for him or her."[13]

Defendants' argument that "the court erred in not allowing the defendant to demonstrate to the jury that the plaintiff was compensated for time missed from work" is not only asserted in a perfunctory and

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[11] *Flamer v. State*, 953 A.2d 130, 134 (Del. 2008) (citing *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993); *Turnbull v. Fink*, 644 A.2d 1322, 1324 (Del. 1994) (emphasis added)).

[12] *Id.* (citations omitted).

[13] *Gonzalez v. Caraballo*, 2008 WL 4902686, at *3 (Del. Super. Nov. 12, 2008) (citing *Pinto v. Universidad de Puerto Rico*, 895 F.2d 18, 19 (1st Cir. 1990)); *see also Pelfresne v. Village of Williams Bay*, 917 F.2d 1017, 1023 (7th Cir. 1990) ("A litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite lack of supporting authority … forfeits the point. We will not do his research for him." (citations omitted)); *United States v. Holm*, 326 F.3d 872, 877 (7th Cir. 2003); *Flanigan's Enter., Inc. v. Fulton County*, 242 F.3d 976, 987 n.16 (11th Cir. 2001); *Scott v. Hern*, 216 F.3d 897, 910 n.7 (10th Cir. 2000); *Mathis v. N.Y. Life Ins. Co.*, 133 F.3d 546, 548 (7th Cir. 1998); *Roca v. E.I. du Pont de Nemours*, 842 A.2d 1238, 1242-43 (Del. 2004); *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993); *Rossitto v. State*, 298 A.2d 775, 777-78 (Del. 1972).

undeveloped fashion, but is stated without any citation to case law from either Delaware or elsewhere.[14] It is egregious enough that counsel did not provide supporting authority for this claim of error. But it is far worse when the law provided by opposing counsel, and independently researched by the Court, is directly contrary to the conclusory position asserted by Defendants. In short, it is one thing to make an argument entirely void of citations, but it is another to assert without support that the Court erred, and yet another to assert a position that is plainly wrong and against long-standing case law.

The Court could summarily dispose of this argument simply by concluding that it has been waived due to the lack of citation to authority. But it takes this opportunity to point out what it already explained at sidebar when this very same point was raised and ruled upon by the Court. That is, the collateral source rule expressly provides that the challenged testimony is inadmissible as irrelevant.

That rule, which is firmly embedded in Delaware law, dictates that "a tortfeasor has no right to any mitigation of damages because of payments or compensation received by the insured person from an independent source."[15] Under the rule, a plaintiff may recover damages from a tortfeasor for the reasonable value of medical services, even if the

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[14] *See* Docket 36 (Defs'. Mot. for Remittitur or New Trial), ¶ 19.

[15] *Mitchell v. Haldar*, 883 A.2d 32, 38 (Del. 2005) (quoting *Yarrington v. Thornburg*, 205 A.2d 1, 2 (Del. 1964)); *see also State Farm Auto. Ins. Co. v. Nalbone*, 569 A.2d 71, 73 (Del. 1989).

plaintiff has received complete recompense for those services from a source other than the tortfeasor. In light of this principle, the defendants here cannot be heard to complain that they were precluded from eliciting testimony about Plaintiff's disability benefits when that evidence is irrelevant and inadmissible.

While the Court has ruled on this issue on its merits, in the future, it will deny any motion on a question of law or the application of facts to law where that motion is not supported by pertinent authority. Here, counsel's failure to engage in the research necessary to develop this argument -- and thereby discover its weaknesses -- left them in the humbled position of having to be educated on the law by the Court.

Plaintiffs' Motion for Costs and Interest

Plaintiffs move for costs and interest pursuant to Superior Court Civil Rule 54(d), 10 *Del. C.* § 8906, and 6 *Del. C.* § 2301(d). By letter dated April 3, 2008, Plaintiffs issued a settlement demand for the $1 million limits of Defendants' insurance policy.[16] Defendants did not offer this amount within the thirty days set by the settlement demand, or at any later date. Immediately prior to and during trial, the parties engaged in settlement negotiations. According to Defendants, Plaintiffs asked for a $500,000 settlement, but rejected an Offer of Judgment in that amount made while the jury was deliberating.

[16] Docket 35, Ex. B.

Costs under Rule 54(d) and 10 *Del. C.* § 8906

Plaintiffs now seek reimbursement for the following expenses:

(1) Filing Fees	$293.50
(2) Trial Fee	$150.00
(3) Service Fees	$60.00
(4) Dr. McAfee Trial Deposition Video Fee	$3,750.00

Defendants contend that Dr. McAfee's expert witness fee is excessive. Defendants also appear to suggest that Plaintiffs' refusal to accept the Offer of Judgment in the amount of $500,000.00 after informally requesting that amount should affect their ability to receive prejudgment interest. The remaining requests for court fees are uncontested.

Under Superior Court Civil Rule 54(d), the prevailing party in a civil action may recover costs against the adverse party.[17] In addition, the prevailing party is permitted to recover expert witness testimony fees in an amount fixed by the Court under 10 *Del. C.* § 8906. Generally, the prevailing party may only recover those expert witness fees associated with time spent testifying or waiting to testify, along with reasonable

[17] Super. Ct. Civ. R. 54(d) ("Except when express provision therefor is made either in a statute or in these Rules or in the Rules of the Supreme Court, costs shall be allowed as of course to the prevailing party upon application to the Court within ten (10) days of the entry of final judgment unless the Court otherwise directs.").

travel expenses.[18] The amount to be awarded for expert witness testimony is a matter of the trial court's discretion.[19]

In assessing the reasonableness of medical experts' testimonial fees, this Court has frequently relied upon rates set forth in a 1995 study conducted by the Medical Society of Delaware's Medico-Legal Affairs Committee, as adjusted to reflect increases in the consumer price index for medical care.[20] The Medico-Legal Study reported that fees for a half-day of medical expert testimony ranged from $1,300 to $1,800.[21] Here, the Court finds that there has been an increase of 50.3% in the consumer price index for medical care from the beginning of 1996 to January 2009.[22] Therefore, the applicable range of reasonable half-day testimony fees would be $1,953.90 to $2,705.40.

The Court will first address Plaintiffs' request for $3,750.00 to reimburse the cost of a video trial deposition of Dr. Paul McAfee, Mr. Novkovic's neurosurgeon. Defendants concede that the cost of Dr. McAfee's deposition is recoverable, but argue that the fee sought is

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[18] *Spencer v. Wal-Mart Stores East, LP*, 2007 WL 4577579, at *1 (Del. Super. Dec. 5, 2007).

[19] *Taveras v. Mesa*, 2008 WL 5244880, at *1 (Del. Super. Dec. 15, 2008) (citing *Donovan v. Del. Water & Air Res. Comm'n*, 358 A.2d 717, 722-23 (Del. 1976)).

[20] *See Bond v. Yi*, 2006 WL 2329364, at *3 (Del. Super. Aug. 10, 2006) (collecting cases); *Gates v. Texaco, Inc.*, 2008 WL 1952164, at *1 (Del. Super. Mar. 20, 2008).

[21] *See Gates*, 2008 WL 1952164, at *1.

[22] At the time of this opinion, consumer price index figures for February 2009 had not been released. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Archived News Releases for Consumer Price Index*, *available at* http://www.bls.gov/schedule/archives/cpi_nr.htm (last visited Mar. 6, 2009).

excessive for a deposition lasting approximately one hour. The Court agrees with Defendants, and will reduce the award for Dr. McAfee's fee to $2,500.00.

The Court acknowledges that its award for Dr. McAfee's deposition is higher than the Medico-Legal Study rates suggest as reasonable for an hour of medical expert testimony. The Court is convinced, however, that its award is reasonable in the context of this case and this particular expert. Dr. McAfee was Mr. Novkovic's treating physician and surgeon, and thus presumably was not hired with consideration for the potential cost of his trial testimony. He is a nationally-renowned spinal surgery specialist, and does not practice in the local area. Facing a complicated and serious injury, Mr. Novkovic evidently chose Dr. McAfee based upon his reputation, experience, and expertise. Both Dr. McAfee's expertise and his status as Mr. Novkovic's treating physician made his deposition testimony particularly valuable at trial. Under these circumstances, the Court considers it reasonable that Dr. McAfee would command a trial deposition fee that is somewhat higher than generally awarded for medical expert testimony.

Pre-Judgment and Post-Judgment Interest

Turning now to Plaintiffs' requests for interest, the Court finds that Plaintiffs are entitled to both pre-judgment and post-judgment interest. The Delaware Code allows for pre-judgment interest in certain tort

actions for bodily injuries. In relevant part, 6 *Del. C.* § 2301(d) provides as follows:

> [I]nterest shall be added to any final judgment entered for damages awarded, calculated at the rate established in subsection (a) of this section, commencing from the date of injury, provided that prior to trial the plaintiff had extended to defendant a written settlement demand valid for a minimum of 30 days in an amount less than the amount of damages upon which the judgment was entered.[23]

Plaintiffs' April 2008 letter to Defendants' counsel demanding the limits of Defendants' liability policy constitutes a "written settlement demand valid for a minimum of 30 days in amount less than the amount of damages upon which the judgment was entered." Any informal requests for specific settlement amounts made during negotiations at trial are irrelevant to the application of § 2301(d), which is only implicated when there has been a written demand. The Court takes judicial notice that the Federal Reserve discount rate on November 30, 2006, the date of injury, was 6.25%; the legal rate under § 2301(a) is therefore 11.25%. Accordingly, Plaintiffs' damages award will include pre-judgment interest of 11.25%, commencing from November 30, 2006.

Finally, Plaintiffs are entitled to post-judgment interest on their damages awards.[24] Post-judgment interest accrues beginning on the date "the judgment is entered as final and determinative of a party's

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[23] The relevant interest rate is established in § 2301(a) as follows: "Where there is no expressed contract rate, the legal rate of interest shall be 5% over the Federal Reserve discount rate including any surcharge as of the time from which interest is due."

[24] *See, e.g.*, *Wilm. Country Club v. Cowee*, 747 A.2d 1087, 1097 (Del. 2000).

rights."[25] Here, the entry of judgment occurred when the jury rendered its verdict on February 11, 2009. Interest will therefore accrue from that date, at the 5.5% legal rate of interest set by § 2301(a).[26]

Conclusion

In summary, the Court is satisfied that there is no basis to discount the jury verdict. Given the evidence adduced at trial, the verdict was not so out of proportion as to shock the Court's conscience and sense of justice. Rather, the amount awarded was both fair and reasonable. The verdict will therefore stand.

Plaintiffs are entitled to costs, although their award will be adjusted to reflect a reasonable amount for their medical expert's trial deposition. Plaintiffs are hereby awarded costs of $3,003.50. Plaintiffs are also entitled to pre-judgment and post-judgment interest on their damages awards. The total interest due is to be calculated by the parties, consistent with this order.

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[25] *Id.* Plaintiffs' motion suggests that post-judgment interest does not accrue when a motion for new trial is filed and pending before the Court. The Court appreciates Plaintiffs' refreshing surfeit of caution, but believes that this statement arises from a misreading of Superior Court Civil Rule 62(b), which permits the Court to impose a discretionary stay on any *execution* of the judgment pending disposition of a motion for new trial or remittitur. Rule 62(b) does not affect the time at which judgment is entered, however, and thus has no bearing on the accrual of interest. *See Bejger v. Shreeve*, 1997 WL 524060 (Del. Super. June 26, 1997); *Hughes v. Jardel Co., Inc.*, 1987 WL 12433, at *2 (Del. Super. June 8, 1987) ("This Court is satisfied . . . that the position most consistent with the purpose of awarding post-judgment interest is that the judgment creditor is entitled to post-judgment interest regardless of the posture of the parties subsequent to the entry of judgment."), *aff'd on other grounds*, 523 A.2d 518 (Del. 1987).

[26] The Federal Reserve discount rate on February 11, 2009, was 0.5%.

IT IS SO ORDERED.

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PEGGY L. ABLEMAN, JUDGE

Original to Prothonotary
cc: Bartholomew J. Dalton, Esquire
Seth A. Niederman, Esquire
Michael P. Pullano, Esquire